

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARINA HILDINGER-LOPEZ,)	CASE NO. C07-0270-JLR
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
MICHAEL J. ASTRUE,)	DISABILITY APPEAL
Commissioner of Social Security,)	
)	
Defendant.)	
)	

Plaintiff Marina Hildinger-Lopez proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be AFFIRMED IN PART and REMANDED IN PART for further administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1956.¹ She has completed the ninth grade.² Plaintiff previously worked as a deli worker, a life guard, a home care worker, and a volunteer fire fighter.

Plaintiff filed her SSI application on May 30, 2003, alleging disability since December 9, 2002. (AR 16.) Her application was denied at the initial level and on reconsideration, and she timely requested a hearing. On January 24, 2006, ALJ Wayne N. Araki held a hearing, taking testimony from plaintiff. (AR 15.) The ALJ issued a decision finding plaintiff not disabled on April 27, 2006. (AR 15-25.)

Plaintiff timely appealed. The Appeals Council denied her request for review on January 24, 2007, making the ALJ's decision the final decision of the Commissioner. (AR 6-9.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since her alleged onset date. At step two, it must be

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

² (*See* AR 107; *but cf.* AR 16 (the ALJ's decision states that plaintiff has only an eighth grade education).)

01 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
02 peripheral neuropathy and affective disorder severe. Step three asks whether a claimant's
03 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not
04 meet or equal the criteria for any listed impairment. If a claimant's impairments do not meet or
05 equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine
06 at step four whether the claimant has demonstrated an inability to perform past relevant work.
07 The ALJ assessed plaintiff's RFC and found her unable to perform any past relevant work. If a
08 claimant demonstrates an inability to perform past relevant work, the burden shifts to the
09 Commissioner to demonstrate at step five that the claimant retains the capacity to make an
10 adjustment to work that exists in significant numbers in the national economy. Using the Medical-
11 Vocational Guidelines (Grid) as a framework at step five, the ALJ found plaintiff capable of
12 performing jobs existing in significant numbers in the national economy, including work as a
13 semiconductor bonder, a callout operator, and a charge account clerk.

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
17 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
18 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
20 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
21 2002).

22 In the order presented in plaintiff's opening brief, plaintiff's arguments are that the ALJ

01 erred by: (1) mechanically applying age categories in a borderline situation; (2) relying on the
02 vocational expert (VE)'s testimony at step five even though it departed from the Dictionary of
03 Occupational Titles (DOT) for the jobs identified; (3) failing to evaluate the 2005 opinions of
04 treating rheumatologist Dr. Slack; and (4) incorrectly finding that plaintiff did not have a severe
05 musculoskeletal condition.

06 Plaintiff seeks remand for an award of benefits or, alternatively, for further administrative
07 proceedings. The Commissioner argues that the ALJ's decision is supported by substantial
08 evidence and should be affirmed. For the reasons described below, the Court finds the matter
09 should be affirmed in part and remanded in part for further administrative proceedings.

10 Age Categories in a Borderline Situation

11 Plaintiff argues that the ALJ erred by mechanically applying age categories in a borderline
12 situation. Plaintiff highlights the two factors necessary for a claimant to qualify for borderline
13 consideration: (1) claimant must be within a few days to a few months of reaching an older age
14 category, and (2) using the older age category would result in a determination or decision that
15 claimant is disabled. 20 C.F.R. § 416.963(b) (2007).

16 Plaintiff draws attention to the fact that her age, at the time of the ALJ's decision nearly
17 three years after she applied for SSI benefits, was forty-nine years and ten months. Plaintiff
18 observes that the ALJ applied the age category of "younger person" (under age 50), but that at
19 forty-nine years and ten months, she was within a few months of reaching the older age category
20 of "person closely approaching advanced age" (age 50-54). Plaintiff notes that if the ALJ had
21 used the "person closely approaching advanced age" age category instead of the "younger person"
22 age category, Grid Rule 201.10 would have applied and directed the decision that she is disabled.

01 Plaintiff argues that the ALJ should have acknowledged the borderline situation and that he should
02 have elaborated on his reasons for choosing the “younger person” age category over the “person
03 closely approaching advanced age” age category.

04 The Commissioner responds that, although a borderline situation did arise by the time of
05 the ALJ’s decision, plaintiff was not in a borderline situation for most of the period under
06 consideration, and, therefore, the ALJ’s classification was proper.

07 Plaintiff replies that the Commissioner has proposed a “most of the period” exception to
08 the borderline rule. Plaintiff argues that such an exception is not justified by legal authority,
09 contravenes the plain language of the regulation, and would emasculate the rule.

10 The borderline rule states as follows:

11 *How we apply the age categories.* When we make a finding about your ability to do
12 other work under § 416.920(f)(1), we will use the age categories in paragraphs (c)
13 through (e) of this section. We will use each of the age categories that applies to you
14 during the period for which we must determine if you are disabled. We will not apply
15 the age categories mechanically in a borderline situation. If you are within a few days
16 to a few months of reaching an older age category, and using the older age category
17 would result in a determination or decision that you are disabled, we will consider
18 whether to use the older age category after evaluating the overall impact of all the
19 factors of your case.

20 20 C.F.R. § 416.963(b) (2007).

21 The Commissioner’s proposed “most of the period” exception to the borderline rule is not
22 supported by the regulations or any other case authority. Although a particular result is not pre-
ordained in a borderline situation, the ALJ must, at a minimum, acknowledge and assess the
borderline situation. *See, e.g., Young v. Barnhart*, 287 F. Supp. 2d 905, 913 (N.D. Ill. 2003)
 (“While we do not instruct the ALJ to select a particular age category, we remand this case to the
ALJ for a borderline age analysis as required in 20 C.F.R. § 416.963”). Therefore, the ALJ should

01 perform a borderline age analysis upon remand.

02 DOT's Definition of "Sedentary"

03 Plaintiff argues that the ALJ erred by relying on the VE's testimony at step five even
04 though it departed from the DOT for the jobs identified. Plaintiff acknowledges that the ALJ
05 followed proper procedure, as required by Social Security Ruling (SSR) 00-4p, by inquiring as to
06 whether the VE's testimony conflicted with the DOT. *See Massachi v. Astrue*, 486 F.3d 1149,
07 1152-1154 (9th Cir. 2007). Plaintiff asserts that SSR 96-9p provides a definition of "sedentary"
08 which should govern the interpretation of the DOT's usage of "sedentary," and that SSR 96-9p's
09 definition requires the ability to sit for two hours at a time. The RFC limitations posed by the
10 ALJ's hypothetical, on the other hand, were more restrictive and required the ability to sit for only
11 one hour at a time. Plaintiff asserts that, therefore, the VE incorrectly testified that the three jobs
12 satisfied the sitting limitation posed by the ALJ's hypothetical, since the jobs are classified in the
13 DOT as "sedentary," and thereby, required the ability to sit for two hours at a time.

14 The Commissioner responds by distinguishing the DOT's general definition of "sedentary"
15 found in Appendix C of the DOT from the more specific definition of "sedentary" found in SSR
16 96-9p. The Commissioner argues that the ALJ's hypothetical limitations did not depart from the
17 DOT's definition of "sedentary." Furthermore, the Commissioner contends that while SSR 96-9p
18 defines the full range of work which could be included in the "sedentary" occupational base, the
19 ALJ found plaintiff's RFC limited her to less than the full range of "sedentary" work. The
20 Commissioner argues that, accordingly, the ALJ's hypothetical reflected plaintiff's RFC
21 limitations, and that the ALJ properly relied on the VE's testimony in response to his hypothetical.

22 The ALJ found that plaintiff's RFC allows her to "sit for 60 min intervals for an 6-8 hour

01 day with routine workplace break and stretch breaks.” (AR 24.) The ALJ also acknowledged that
02 plaintiff’s RFC does “not allow her to perform the full range of sedentary work.” (AR 25.)
03 Therefore, the ALJ could not rely solely on the Grid rules to direct a decision, but rather had to
04 use the Grid as a framework. The ALJ consulted the VE and posed a hypothetical reflecting
05 plaintiff’s RFC. (AR 560.) After the VE testified to three examples of jobs which would satisfy
06 plaintiff’s RFC, the ALJ specifically asked whether those jobs would accommodate a sit/stand
07 option and the VE affirmed that they would.³ (AR 564.)

08 The DOT defines “sedentary work” as:

09 Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition
10 exists up to 1/3 of the time) and/or a negligible amount of force frequently
11 (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry,
12 push, pull, or otherwise move objects, including the human body. Sedentary work
involves sitting most of the time, but may involve walking or standing for brief periods
of time. Jobs are sedentary if walking and standing are required only occasionally and
all other sedentary criteria are met.

13 DOT, Appendix C.

14 The DOT does not confine “sedentary” to jobs that require the ability to sit for two hours
15 at a time. The DOT only states that “[s]edentary work involves sitting *most of the time*.” *Id.*
16 (emphasis added). Therefore, there is no conflict between the DOT’s definition of “sedentary” and
17 the limited ability to sit for only one hour at a time. As such, the VE’s testimony, that the three
18 “sedentary” jobs satisfied the ALJ’s hypothetical, did not depart from the DOT. *See, e.g., Martin*
19 *v. Barnhart*, 470 F. Supp. 2d 1324 (D. Utah 2006).

22 ³ The sit/stand inquiry is not reflected in the ALJ’s decision.

01 Neither did the VE's testimony conflict with SSR 96-9p's definition of "sedentary." The
02 guidance sections found in SSR 96-9p are used for determining when and by how much the
03 "sedentary" occupational base has been eroded. *See* SSR 96-9p. The "sedentary" occupational
04 base is the full range of approximately 200 jobs contemplated by the Grid as unskilled sedentary
05 occupations. *See id.* The occupational base is eroded when a claimant's RFC limitations are more
06 restrictive than outlined by the SSR 96-9p guidance sections. *See id.* When the occupational base
07 has been eroded, it means that the claimant is unable to perform some, but not necessarily all, of
08 the approximately 200 unskilled sedentary jobs. *See id.* Therefore, an eroded occupational base
09 does not direct a finding of disabled, but rather, requires an ALJ to consult a VE rather than
10 relying on the Grid rules to direct a decision. *See id.*

11 While the "sitting" guidance section of SSR 96-9p does identify "approximately 2-hour
12 intervals" for the suggested timing of the three official breaks (morning, lunch, and afternoon), the
13 only specific factor that the "sitting" guidance section indicates to be an erosion of the
14 occupational base is the total hours an individual is able to sit in an eight-hour work day. But even
15 if we accepted plaintiff's argument that the occupational base was eroded by the plaintiff's RFC
16 limiting her to sitting for one hour at a time, the ALJ satisfied the procedural requirement of
17 consulting a VE. Of the approximately 200 unskilled sedentary jobs, the VE's testimony identified
18 three which satisfied the ALJ's more restrictive hypothetical reflecting plaintiff's RFC. The ALJ's
19 step five finding based on this vocational testimony was supported by substantial evidence and
20 should be affirmed.

21 Dr. Slack's 2005 Opinions

22 Plaintiff argues that the ALJ erred by failing to evaluate the 2005 opinions of treating

01 rheumatologist Dr. Slack. A treating physician's opinion may only be rejected with "clear and
02 convincing" reasons if uncontroverted, or "specific and legitimate" reasons if controverted. *Lester*
03 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). A specialist's opinion is generally given more weight
04 in his or her area of specialty than the opinion of a non-specialist. 20 C.F.R. § 416.927(d)(5)
05 (2007). Dr. Slack has been plaintiff's treating rheumatologist since at least October 2002. (AR
06 267-69.) Plaintiff notes that Dr. Slack completed two state Department of Social and Health
07 Services (DSHS) Physical Evaluation forms in 2005, and that Dr. Slack's opinions of plaintiff's
08 RFC were more restrictive than the ALJ's findings. (AR 509-12, 520-23; cf. AR 15-25.) Plaintiff
09 argues that the ALJ did not evaluate, much less provide adequate reasons for rejecting, Dr. Slack's
10 2005 opinions, and that, therefore, they should be credited as true. *See Lester*, 81 F.3d at 834.

11 The Commissioner responds that the ALJ properly evaluated all of Dr. Slack's opinions,
12 even if he did not discuss the 2005 opinions specifically. The Commissioner argues that the ALJ
13 gave legally sufficient reasons for rejecting a short undated chart note from Dr. Slack. (AR 281
14 (referred to as "Dr. Black" by the ALJ. AR 22.)) Moreover, the Commissioner identifies various
15 reasons why the ALJ might have rejected Dr. Slack's opinions.

16 As Dr. Slack is a treating physician, the ALJ needed to provide adequate reasons, either
17 "clear and convincing" if uncontroverted or "specific and legitimate" if controverted, to reject Dr.
18 Slack's opinions. While the ALJ does use some of Dr. Slack's earlier opinions as references for
19 some of his findings, his decision does not expressly refer to or reject Dr. Slack's 2005 opinions.
20 (*Cf.* AR 17 (citing to AR 241, 247), AR 18 (citing to AR 247) *with* AR 15-25.) Dr. Slack's 2005
21 opinions do not appear to be contradictory of the ALJ's findings, but since the matter is being
22 remanded, the ALJ should also specifically address Dr. Slack's 2005 opinions upon remand.

Musculoskeletal Condition

Plaintiff argues that the ALJ erred by incorrectly finding that plaintiff did not have a severe musculoskeletal condition. Plaintiff indicates that SSR 96-3p provides that an impairment will be found to be severe if it causes more than a minimal limitation on a claimant's ability to perform basic work activities. Plaintiff notes two surgeries to treat a herniated disc, one of which was only submitted as evidence to the Appeals Council, and one surgery to treat her left knee. (AR 495; AR 530; AR 398, 403.)

The Commissioner responds that it is plaintiff's burden to prove that her impairments were severe and that an impairment is severe when it causes a significant limitation on a claimant's ability to perform basic work activities. The Commissioner asserts that a diagnosis of an impairment does not prove that the impairment is severe, and that plaintiff's impairments improved as a result of various surgeries. (AR 17, 412, 415, 432; AR 18, 398, 552.) The Commissioner also contends that the ALJ properly found plaintiff not credible regarding the extent of her impairments, averring inconsistencies in plaintiff's statements and between plaintiff's statements and activities. The Commissioner argues, moreover, that even if plaintiff's herniated disc and left knee were accepted as severe impairments, there was no evidence that they further limited plaintiff's RFC beyond what the ALJ determined it to be, and any error, if it existed, would be harmless.

The ALJ's decision directly addresses both plaintiff's herniated disc and left knee, commenting that plaintiff reported significant improvement in her symptoms related to her herniated disc and left knee after surgery:

The claimant began complaining of back pain in early 2004. In April of 2004,

01 magnetic resonance imaging showed multilevel degenerative disc disease with small
02 broad-based disc bulge at L5-S1, causing mild bilateral neural foraminal stenosis. In
03 July of 2004, the claimant underwent a hemilaminectomy, microdiscectomy, and
04 foraminotomy in the lumbar spine. By November of 2004, the claimant reported that
05 she was much better. She reported that she was able to do all of the activities she
06 wanted to do. In January of 2005, she reported that she was doing well overall. She
07 reported that her back had improved significantly since surgery. Imaging in February
08 of 2005 showed no recurrent or residual disc extrusion. The claimant's degenerative
09 disc disease was stable.

06 In January of 2005, the claimant was diagnosed with a meniscal tear in the left knee.
07 The next month she underwent a left knee arthroscopy. She testified at the hearing
08 [sic] that the surgery helped her symptoms.

08 The medical evidence establishes that the claimant has the following medically
09 determinable impairments: peripheral neuropathy and affective disorder.

10 (AR 17-18, internal citations to record omitted.) The ALJ also considered plaintiff's herniated
11 disc and left knee when evaluating her RFC:

12 The apparent inconsistency between the statements of the claimant and her son raises
13 questions as to the severity of claimant's impairments. Overall, her son's testimony
14 viewed in light of her statements leads to the conclusion that claimant embellishes her
15 limitations and that she has overstated the extent her impairments have affected her
16 functioning.

15 The claimant testified that she has been going down hill since quitting her last job at
16 Albertson's. . . The surgery in July of 2004 did not improve her back. She reported
17 that her doctor wanted to repeat the surgery. The claimant complained of severe pain
18 in her back, hips, and thighs. She had to lie down to relieve the pain. The claimant
19 reported left knee surgery [in] February 2005, which helped her symptoms.

18 . . .

19 I find considerable contradiction in the claimant's complaints, both to this agency and
20 to her mental health providers, and her actual functioning.

21 (AR 20.) Although the ALJ found plaintiff's complaints to be somewhat exaggerated, he
22 nevertheless incorporated plaintiff's complaints regarding her back and knee into his RFC

01 assessment:

02 The claimant has the following residual functional capacity: she is able to lift and carry
03 10 pounds, to stand and walk for 15-30 minutes at a time for a total of 5 hours in an
04 8-hour workday, sit for 60 min intervals for an 6-8 hour day with routine workplace
break and stretch breaks. She is unable to climb, balance, crawl, or kneel. She can
occasionally stoop and crouch.

05 (AR 24.)

06 The claimant bears the burden of proof at step two. To satisfy step two's requirement of
07 a severe impairment, the claimant must prove the physical or mental impairment by providing
08 medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own
09 statement of symptoms alone will not suffice. *See* 20 C.F.R. § 416.908. In this case, plaintiff
10 failed to carry her burden of proof regarding the herniated disc and left knee. The mere listing of
11 surgeries to treat her herniated disc and left knee do not establish that those impairments had any
12 effect on plaintiff's ability to perform basic work activities. If anything, those surgeries have been
13 shown to have improved her ability to perform basic work activities.

14 Finally, even if the ALJ erred in not analyzing plaintiff's musculoskeletal condition at step
15 two of the sequential analysis, such error would be harmless, given the extensive consideration of
16 plaintiff's herniated disc and left knee at step four in establishing her RFC. *Lewis v. Astrue* ,
17 ___F.3d ___, No. 04-17414, 2007 WL 2325018 at *2 (9th Cir. July 3, 2007, amended August
18 16, 2007).⁴ For this reason, and for the reasons described above, plaintiff fails to demonstrate
19 error with respect to the ALJ's consideration of her musculoskeletal condition.

21 ⁴ An unpublished decision in the same case addresses the consideration of other
22 impairments at step two. *Lewis v. Astrue*, No. 04-17414, 2007 WL1975601 at *1 (9th Cir. July
3, 2007).

CONCLUSION

For the reasons set forth above, this matter should be AFFIRMED IN PART and REMANDED IN PART for further administrative proceedings. On remand, the ALJ should perform a borderline age analysis and address Dr. Slack's 2005 opinions.

DATED this 20th day of September, 2007.



Mary Alice Theiler
United States Magistrate Judge